LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
AUG 3 1965
JOHN F. DAVIS, CLERK

No. 353

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

KOHLER CO., *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD

and

LOCAL 833, UAW-AFL-CIO, INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, *Respondents.*

BRIEF IN OPPOSITION FOR LOCAL 833, UAW-AFL-CIO

JOSEPH L. RAUH, JR.,
JOHN SILARD,
STEPHEN I. SCHLOSSBERG,
1625 K Street, N. W.,
Washington, D. C.
Attorneys for Local 833, UAW-AFL-CIO.

INDEX

	Page
No Substantial Question Is Presented by a Board Decision Compelled by the Long Record of Kohler's Calculated and Provocative Violations of Its Workers' Statutory Rights	3
A. The Pre-Strike Bargaining Question—20 Years of Kohler Contempt for Federal Law	3
B. The Dischargee Question—"Unremitting Calculated Provocations" as Ground for Reinstatement	14
Conclusion	20

Table of Cases

Appeal of Coates, 287 P. 2d 102, 47 Wash. 2d 51	17
Glus v. *Brooklyn Terminal*, 359 U.S. 231	17
Kohler Co., 108 NLRB 207 (1954)	5
Mastro Plastics Corp. v. *N.L.R.B.*, 350 U.S. 270 (C.A. 3)	17
N.L.R.B. v. *Clearfield Cheese Co.*, 213 F. 2d 70	19
N.L.R.B. v. *Fansteel Metallurgical Corp.*, 306 U.S. 240	19
N.L.R.B. v. *Kohler Co.*, 220 F. 2d 3 (C.A. 7, 1955)	5
N.L.R.B. v. *Longview Furniture Co.*, 206 F.2d 274 (C.A. 4)	19
N.L.R.B. v. *Reed & Prince Mfg. Co.*, 205 F. 2d 131, 134-135 (C.A. 1, 1953), *cert. den.* 346 U.S. 887	7
W. T. Rawleigh Co. v. *N.L.R.B.*, 190 F. 2d 832	19

Miscellaneous

Hearings before the Select Committee on Improper Activities in the Labor or Management Field, 85 Cong., 2d Sess., Part 24, pp. 9607 *et seq.*, pp. 9871 *et seq.*	4
House Conference Rept. No. 510, on H.R. 3020, at p. 55	18
The Kohler Company, 1 Decisions of the National Labor Relations Board, 72, 75 (1934)	4
Walter H. Uphoff, *The Kohler Strike* (1935), *passim*	4

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 353

KOHLER CO., *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD

and

LOCAL 833, UAW-AFL-CIO, INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, *Respondents.*

BRIEF IN OPPOSITION FOR LOCAL 833, UAW-AFL-CIO

This is Kohler Company's third application for certiorari in a single Labor Board case already in litigation for eleven years. Kohler first sought to transfer the proceedings out of the District of Columbia Circuit (cert. denied, 365 U.S. 869). Then it sought review of the 1962 Court of Appeals decision enforcing the 1960 Labor Board ruling which found Kohler in numerous violations of the Labor Act and remanding to the Board two subsidiary questions (cert. denied, 370 U.S. 911). It is upon those two subsidiary

questions remanded to the Board that Kohler presently seeks this Court's review.

On August 26, 1960, following six years of proceedings before the National Labor Relations Board involving more than twenty thousand pages of testimony and one thousand exhibits, the Board unanimously found Kohler guilty of repeated violations of its obligations under the federal labor law. On January 26, 1962, the court below (300 F. 2d 699, Supp. J.A. 2318) affirmed the Board's findings that the Company had engaged in numerous violations of its obligations under the law, including refusal to bargain on and after June 1, 1954, unlawful unilateral wage increases, illegal inducement of workers to abandon the strike, prohibited surveillance of protected activities, arbitrary refusal to furnish data necessary for bargaining, discriminatory denial of housing to striking workers and discriminatory discharge of strikers.[1] And going even beyond the Board's findings, the court below remanded to the Board for further findings and disposition the question whether the Company had refused to bargain in good faith prior to the commencement of the strike on April 5, 1954, and the question whether 77 strikers discharged for "misconduct" should be reinstated pursuant to the discretionary authority of the Board under Section 10(c) of the Act. Certiorari was denied on June 4, 1962 (370 U.S. 911).

On September 29, 1964, the Board issued its Supplemental Decision and Supplemental Order (Supp. J.A. 2339)

---

[1] The Board and the Court of Appeals directed reinstatement of strikers, "dismissing if necessary, any person hired on or after" June 1, 1954 (J.A. 81). Upon Kohler's refusal to dismiss the strikebreakers and its failure to make proper reinstatement of strikers, the Board instituted contempt proceedings. A Special Master has found Kohler in contempt and this matter is pending before the court below (*N.L.R.B.* v. *Kohler Co.*, No. 16,031).

holding that the strike was an unfair labor practice strike from its inception in April, 1954, and reinstating 57 of the 77 discharged strikers. The Company now seeks review of the Court of Appeals' affirmance of these two rulings, but it fails to set forth the salient facts upon which they are predicated. The applicable facts found by the Board, which we review herein, were compelling on the determination whether the strike was originally provoked by the Company's unfair labor practices and whether certain of the discharged strikers should be reinstated "to effectuate the policies" of the Act. Since Board rulings whether a strike is economic or unfair labor practice in origin and whether to reinstate strikers to effectuate the policies of the Act are clearly within the areas of its statutory authority, the overwhelming factual underpinning of the Board's determinations in this case demonstrates without more the absence of any colorable issue for this Court's review.

No Substantial Question Is Presented by a Board Decision Compelled by the Long Record of Kohler's Calculated and Provocative Violations of Its Workers' Statutory Rights.

A. *The Pre-Strike Bargaining Question—20 Years of Kohler Contempt for Federal Law*

1. In 1933, faced with the threat of organization by the American Federation of Labor, Kohler built its own "union"—the Kohler Workers' Association. Lyman Conger, who for many years has been Kohler's principal spokesman in labor relations matters, participated in launching KWA (J.A. 3468-3470, 3874-3876). The circumstances of the founding of KWA were carefully sifted by the pre-Wagner Act Labor Board in 1934, with a view to determining Kohler's compliance with the guarantees of un-

coerced organization and bargaining embodied in the National Industrial Recovery Act:

> "Thus it is clear that the company participated in forming and engaged actively in promoting the new organization, that the workers had no opportunity of expressing an unfettered choice as to whether or not they wished to belong to it, and that the company not only indicated its favorable attitude toward the organization but stood ready to finance its existence. Under such circumstances, the organization could not have that independence which is essential to a true collective bargaining agency, and the sudden and extensive promotion of the plan at a time when an outside union was just being formed can only be considered as a deliberate design to influence the allegiance of the employees and to interfere with their free and unhampered self-organization which Section 7(a) guarantees." *The Kohler Company*, 1 Decisions of the National Labor Relations Board, 72, 75 (1934).

2. The following year, 1934, the AFL went on strike at Kohler. The Company repulsed the AFL's efforts with a bloody ferocity which stamped Kohler's attitude toward labor relations as unique even in that era. See Walter H. Uphoff, *The Kohler Strike* (1935), *passim; Hearings before the Select Committee on Improper Activities in the Labor or Management Field*, 85 Cong., 2d Sess., Part 24, pp. 9607 *et seq.*, pp. 9871 *et seq.* Thus was ushered in the era of company-dominated "labor peace," the perpetuation of which has remained Mr. Conger's guiding philosophic star in the conduct of Kohler's labor relations ever since 1934. In September of 1954 Conger recalled those events to Judge Arold Murphy, as he rebuffed the Judge's attempts at conciliation: " He [Conger] said that there had been a

bitter strike in 1934; that it resulted in twenty years of labor peace, and that he was going to insist that this strike bring to the Company twenty years of labor peace, and that at some place along the line, he said, 'we are going to teach the union a lesson' " (J.A. 193).

3. The Company's union, KWA, proceeded smoothly upon its unarduous duties until the mid-1940s, when the first signs of opposition to the company union appeared. But it was not until 1951 and 1952, when the UAW first attempted to organize Kohler, that it became necessary for Kohler to resume its coercive anti-unionism. The pattern of Kohler's anti-union attitudes and illegal activities during this period is detailed in *Kohler Co.*, 108 NLRB 207 (1954), and *N.L.R.B.* v. *Kohler Co.*, 220 F. 2d 3 (C.A. 7, 1955). As the Court of Appeals for the Seventh Circuit observed in its enforcement opinion: "The Company argues that there was no proper evidence showing a background of hostility toward the UAW. But throughout the contest between the KWA and the UAW the officers of the Company certainly made no attempt to conceal the fact that they did not want the UAW in the plant, and after the first election, which was won by the KWA, Conger, the Chairman of the Company's Management Committee, boasted: 'We are the ones that won that election for you. We got on the air and put ads in the papers and we are certain that is what changed the picture, otherwise we might be meeting with somebody else right now.' " *Id.* at 9.

4. In 1953, following the UAW's victory in the election of a bargaining representative, Kohler grudgingly concluded a minimal one-year contract with the UAW. But no sooner was the agreement concluded than the Company made even its modest concessions illusory by various types of dilatory conduct. After entering into this contract the Company sought to undermine the status and influence of the Union

as collective bargaining representative by failing to supply information necessary to the effective administration of the contract, by taking coercive action toward union stewards, and otherwise making processing of grievances difficult. For example, information vital to the contractual commitments of 1953 concerning the so-called wage-incentive system was withheld from the Union. Many employees complained that they were receiving less take-home pay by virtue of production standards manipulation, but the Union could never determine the truth or falsity of this claim because Kohler refused to supply needed information (see J.A. 84-85).

5. Before and after 1953 President Herbert V. Kohler articulated his animosity toward the UAW. Said Mr. Kohler in 1952: "... Kohler Company, as a Company, is opposed to the UAW-CIO" (Un. Ex. 21, J.A. 2287)—and he added, significantly, "We have had 17 years of industrial peace at Kohler without the CIO ..." (J.A. 2289). From the witness stand in these Board proceedings, Mr. Kohler made plain the implacable attitude with which he entered into the 1953 contract: "I had an idea from the day we signed the first contract that they were going to pull a strike as soon as they could, as soon as they could drench the minds of these people" (J.A. 260). "They are a very militant union, and they have threatened us over the years, and they have gone on strike, and we are trying to protect our lives.... The life of the Company, that is" (J.A. II, 287). And by November of 1955 Mr. Kohler had generalized the problem: "Who runs this country? ... That is the issue at Kohler. It is the potential question for all industry. We must meet this issue fighting" (G.C. Ex. 326).

6. Negotiations between the Union and the Company for a new contract commenced in early 1954. The Company was "obligated to make some reasonable effort in

some direction to compose differences with the Union." See *N.L.R.B. v. Reed & Prince Mfg. Co.*, 205 F. 2d 131, 134-135 (C.A. 1, 1953), cert. denied, 346 U.S. 887. Far from making any such effort, Kohler deliberately offered only what the Union obviously could not accept. Kohler's conduct with respect to the principal issues between the parties regarding a new contract manifested its desire not to reach but to avoid an agreement with the Union.

In early February, 1954, when negotiating sessions commenced, the Union sought a substantial wage increase; a union shop; the standard UAW pension plan; improvements in the seniority guarantees; increased hospitalization and related benefits; and some amelioration of the conditions of the disadvantaged enamel workers. Kohler, at the outset of the negotiations and throughout the entire prestrike period, rejected *every* significant Union proposal. In addition, Kohler proposed dilution of the seniority guarantees and proposed to "clarify" the existing arbitration arrangements by withdrawing such vital matters as discharges from the arbitrator's jurisdiction and by rendering arbitral awards more vulnerable to judicial attack. On none of the central issues—wage increase, union shop, meaningful arbitration—did Kohler ever make a substantive concession.

7. At the outset of the 1954 negotiations Kohler had proposed a new contract which was in no respect more advantageous to the workers and in many significant respects less advantageous than the existing contract. Until late February Kohler insisted that this was its only proposal. Then, as a UAW International Representative testified,

> "on the 23rd of February, we had noted to the company during a bargaining session that we were rapidly coming down to the deadline. The contract was due to expire on March 1, and it was obvious from the

lack of progress that we were not going to have an agreement by that time and therefore we requested the company that they extend the contract for one month, through the month of March, so that we would have orderly procedures in the plant for collective bargaining and that we would still be working under a contract during the time that we were developing the terms of a new contract . . ." (J.A. 552-553).

But the Company *rejected* the Union's proposal to facilitate further bargaining by temporarily extending the contract for one month. Kohler announced that "So long as your contract committee continues to insist on exorbitant and unrealistic demands which would jeopardize the future of the company and the jobs of its employees, a short-term extension of the present contract will not serve any useful purpose" (J.A. 2039). Herbert Kohler had himself had occasion to evaluate precisely this kind of negative response two years before. In 1952, according to Mr. Kohler, in the course of negotiations between Kohler and KWA, "Kohler Co. offered to extend the contract with the KWA pending further negotiations" (J.A. 2264). But the offer was declined, and Mr. Kohler asserted: "*This is not the conduct of people who wish to arrive at a settlement. It is the conduct of people who do not want a settlement, but who want a dispute*" (J.A. 2264).

8. On February 25, 1954, Kohler countered the Union request for a one-month extension of the contract with a proposal for a one-year extension, including the existing arbitration provision (J.A. 142); and on the next day Kohler proposed as an alternative a 3-cent per hour wage increase conditioned on acceptance in toto of Kohler's proposed contract emasculating existing arbitration procedures (J.A. 142-143). If the Union wished to forego any wage

increase, the Union could keep the arbitration provision contained in the 1953 agreement. If the Union wished to take the munificent 3 cents, the Union would have to agree to a contract even more unfavorable, especially with respect to the crucial arbitration provision, than the one which was about to expire. The Company's conditioning of even a paltry 3-cent wage increase upon the Union's relinquishing existing arbitration rights, and its offer to continue those arbitration rights only at the expense of any wage increase whatever, demonstrate a desire to offer only that which the Union obviously could not accept.

9. Kohler's disdain for genuine unions, and its indifference to its statutory obligation to bargain with the certified union of its employees' own choosing, were clearly manifested during the entire pre-strike negotiating sessions. These sessions were punctuated by Conger with his "usual phrase of he didn't see any point in wasting any more time, or didn't see that as they had went as far as they were prepared to go there was no reason to continue" (J.A. 1083-1084). Again, as one of the Union negotiators recalled, "When we would start discussing a direct contractual issue, or a comparison of a contractual point, we never could keep the Company on the subject matter before us. They went into violent attacks against the UAW generally, not just this local union, but throughout the country, and pointed to organized labor in general as being the cause of the ills of the country" (J.A. 952). Meanwhile, Kohler was proceeding with strike preparations which, to judge from the findings made by the Wisconsin Employment Relations Board, drew heavily upon Kohler's bloody repulsion of an independent union back in 1934:

> "There was testimony by the President of the Company to the effect that the Company had equipped and has in its plant a small arsenal. He testified that

there were clubs and guns provided for in the plant. His testimony also indicated that either there were tear bombs provided for in the plant but if not the presence of tear gas bombs would have his approval. With all the legislation on the books today, both Federal and State, aimed at protecting, not only the rights of employees and employers in labor disputes, but the rights of the public as well, it seems inconceivable that in a forward-looking community in a state as progressive as the state of Wisconsin any employer would feel it necessary to resort to self-help by the means of arms, ammunition and tear gas bombs. There is no possible justification for an employer today to resort to the use of such means in any strike" (Co. Ex. 42).

10. When the 1953 contract expired on March 1, 1954, and Kohler still refused to engage in genuine bargaining, the Union was forced into action and on April 5, 1954, the strike commenced. Four weeks later, the Wisconsin Employment Relations Board made a major effort to get the parties back to the bargaining table (J.A. 635-636). As the Wisconsin Board itself described its intervention:

"the Board laid down certain conditions, largely limitations on the type of picketing theretofore conducted, that if accepted by the Union would result in a continuance of the hearing. Conditions laid down by the Board were accepted by the Union. Acceptance of such conditions was contingent on the Company agreeing that it would immediately commence bargaining with representatives of the Union in a bona fide attempt to reach a mutually satisfactory collective bargaining agreement. Arrangements for such bargaining session were immediately made, the first meeting

to be held on Friday, May 7. Such meeting took place with a panel of three impartial mediators present. The bargaining continued throughout that day. In the meantime on Thursday and Friday, picketing was carried on pursuant to the truce agreement. Persons desiring to go to and from the Kohler plant proceeded freely. There was no substantial interference with anyone desiring to enter or leave. At the conclusion of the Friday conference, notwithstanding that the Federal mediators were willing, and the Union representatives were desirous, of continuing the negotiations both on Saturday and Sunday if necessary, the Company representatives arbitrarily refused to bargain on either of those days" (Co. Ex. 42, pp. 7-8).

Conger's stated excuse for not meeting further was that he needed the weekend to prepare a brief due the following Tuesday in the United States District Court action brought by the Union to enjoin further prosecution before the WERB of the Kohler Company's complaint of unfair union practices, over which the state board was thought by the Union to have no jurisdiction (J.A. 3680-3681). Conger persisted in his refusal to meet, notwithstanding the Union's expressed willingness to join with Conger in a request to District Judge Tehan for an extension of time to file briefs in the federal action (J.A. 3681-3682). That there would have been no difficulty in securing such an extension is clear. Indeed on May 14, in exploring settlement possibilities with the parties in chambers, Judge Tehan took occasion to comment on Conger's stalling tactics:

"... Judge Tehan said that he was provoked with the statements that he read in the press, that the company was using the filing of briefs before the United States

District Court as an excuse for not continuing bargaining after May 7th, and he promptly told Mr. Conger:

> 'You know that our rules are quite flexible, and if you wanted an adjournment on the filing of briefs, you could have gotten it for days and months; if this would help settle the strike, that is a more important thing than the filing of briefs' " (J.A. 1467).

Nor is there room for doubt that Conger's refusal to go forward with negotiations over the weekend of May 8 and 9, 1954, gravely jeopardized settlement possibilities. As the WERB later observed: "We are thoroughly satisfied that had the company representatives honestly desired to arrive at settlement of the dispute, they would have been anxious to bargain and would honestly have tried to arrive at a settlement of the issues responsible for this unfortunate work stoppage" (Co. Ex. 42, p. 8).

11. On June 1, 1954, soon after the strike commenced, Kohler granted a unilateral wage increase which eloquently bespoke its continuing unconcern with the statutory requirement of collective bargaining (J.A. 31, 35, 3585-86). The three pennies which Conger had earlier "offered" the Union as the *quid* for the *quo* of foregoing arbitration, suddenly became three pennies which Conger benevolently and unconditionally dispensed to Kohler employees—without consulting or even notifying the exclusive bargaining representative of the employees. Not only was the unilateral increase, as the Board found, a flagrant and grossly prejudicial blow to subsequent negotiations, but the increase withheld from the Union and granted the workers shows again that the only principle motivating the Company at the pre-strike negotiations was the principle of avoiding an agreement with the Union.

12. In determining the genuineness of the Company's

pre-strike bargaining, its anti-union animus, its illegal aggressions against unions and union members, and its conduct of "negotiations," correlate closely with Kohler's record of noncooperation with all public officials who called on Kohler to try to reach an agreement with the Union. Early in the strike Kohler brushed off the conciliation efforts of a federal district judge, Judge Tehan (J.A. 3687-3688), and a state judge, Judge Schlichting (J.A. 1477). Thereafter, Kohler persisted in its pattern of stubborn indifference to its public responsibilities when it (a) refused the arbitration proposal made by Governor Walter J. Kohler (a nephew of Kohler's President) (G.C. Ex. 43); (b) in September, in "its private meetings with Judge Murphy . . . did not even pretend to go through the motions of collective bargaining, despite the Judge's repeated assurances that a slight wage increase would settle all issues in dispute" (J.A. 199); (c) in April, 1955, rejected the proffered good offices of the Mayor and other municipal officials of Sheboygan, Wisconsin (J.A. 2120); (d) in June, 1955, rejected the proffered good offices of a subcommittee of the United States Senate (J.A. 2136-2138). The following November President Kohler explained to an audience in Birmingham his philosophy about proposed interventions of this kind: "The do-gooders have mixed in with offers to help settle the strike. All they really want to do is save face for the Union . . ." (G.C. Ex. 326).

13. Finally, it cannot be put aside in the evaluation of the Company's so-called "bargaining" in the pre-strike period that only a few weeks following the last pre-strike negotiating session of April 3, 1954, the Company commenced its adjudicated 6-year refusal to bargain in good faith with the Union. 300 F. 2d 699, Supp. J.A. 2318, cert. denied 370 U.S. 911. The Company continued its illegal course of conduct to the date of the Board's 1960 decision (and see n. 1, p. 2, *supra*), engaging in numerous violations in disparagement

of the bargaining representative and the freedom of collective protection guaranteed the workers under the Act. Such adjudicated violations include refusal to furnish data necessary for bargaining, unlawful surveillance of Union and workers, discriminatory discharge of striking temporary employees in the Shell Department, discriminatory eviction of strikers from their homes, and two unilateral wage increases not offered to the Union but granted the workers (J.A. 22-28, 149-154, 60-64, 388-394; 40-41; 177-182; 52, 227, 232-234; 31, 34-38, 171-172, 209-210).

• • • • •

The considerations recited above were compelling upon the Board with respect to the question whether the 1954 strike was an unfair labor practice strike in its inception. The Board in a careful analysis replete with recitation of the pertinent facts (Supp. J.A. 2342 to 2354), finds in its 1964 Supplemental Decision that the Company "failed and refused to bargain collectively with the Union in good faith . . . and that this unfair labor practice caused the strike which began on April 5, 1954." No substantial factual or legal question is presented to this Court by the Board's finding on that score. Nor is a material issue presented by the Board's additional finding that the Act's policies are best effectuated by reinstatement of 57 of the strikers discharged by the Company for acts provoked by its own misconduct.

B. *The Dischargee Question—"Unremitting Calculated Provocations" as Ground for Reinstatement*

Section 10(c) of the Act authorizes the Labor Board, upon finding an employer unfair labor practice, to order an employer "to take such affirmative action including reinstate-

ment of employees . . . as will effectuate the policies" of the Act.[2] Exercising that authority, the Board has determined that the "misconduct" of fifty-seven of the strikers discharged by Kohler was, on balance with the Company's unlawful actions provoking that misconduct, not such as to justify their discharge consistent with the policies of the Act. As the Board found (Supp. J.A. 2357):

> "In view of [the Company's] *unremitting calculated provocations,* it is not surprising that the strikers themselves felt compelled to seek both economic survival and the survival of their collective bargaining agent by a massive and sustained demonstration of solidarity. Nor is it surprising that in the face of such provocative conduct by the Respondent, the union leaders urged and directed mass picketing as the only means of Union survival. While we do not condone the mass picketing of the strikers or the planning and direction of such picketing by the union leaders, we must conclude that such activity is attributable no less to the Respondent which provoked that behavior, than to the strikers and union leaders who accepted the challenge presented by Respondent's open preparations and its complete disregard for its employees' statutory rights." (Emphasis supplied.)[3]

---

[2] "If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter. . . . No order of the Board shall require reinstatement of any individual as an employee . . . if such individual was suspended or discharged for cause." 29 U.S.C. 160(c).

[3] The misconduct of the fifty-seven reinstated employees consisted of organizing and engaging in mass picketing and demonstrations at the homes of non-strikers. In the case of the remaining dischargees, who had

The strike of last-resort which commenced on April 5, 1954 with desperate mass picketing by hundreds of Kohler workers, was the inevitable human effect of the Company's own pattern of coercive violation of its workers' statutory rights. Twenty years of contemptuous hostility towards its workers' fundamental rights; many weeks of fruitless negotiations in which Kohler manifested its desire to avoid any agreement and dared the Union to preserve its continuing existence by resorting to self-help; and the specific provocations offered by the Company's recourse to armaments of war—all this inevitably drove its workers to seek economic survival by a massive show of solidarity. Thus the fact that workers engaged in conduct preventing operation of the plant is no less attributable to the Company which provoked it than the individuals who succumbed to provocation. Lawlessness begets lawlessness—an employer who flagrantly and continuously violates the legal and human rights of its workers cannot disclaim responsibility when in desperation they are provoked beyond the breaking point.

Kohler's responsibility for the "misconduct" of its workers is thus beyond question, for no reasonable appraisal of the sequence of events at Kohler can disentangle worker "misconduct" from the years of grievous Kohler "misconduct" in violating the rights of its employees. Of course these considerations do not "justify" employee misconduct. *But they do provide the critical element in the Board's determination that the purposes of the Act are best effectuated not by approving the discharge*

---

engaged in acts of violence or threats of violence, although the Board held this misconduct "probably in part provoked by the Respondent's flagrant unfair labor practices" (Supp. J.A. 2366), the Board refused to order reinstatement. Despite this finding of Company provocation, the Union did not appeal the cases of the unreinstated dischargees in the hope, apparently fruitless, that this 11-year proceeding might thereby be more expeditiously terminated.

of employees for misconduct provoked by the employer's lawlessness but by reinstating such employees and thus restoring as far as possible the status quo existing before Kohler embarked upon its coercive sequence of violations.

Indeed, in reinstating strikers discharged for misconduct provoked by the employer, the Board applied a fundamental equitable principle. It is a core concept in our jurisprudence that it does not allow a party to "take advantage of his own wrong." *Glus* v. *Brooklyn Terminal*, 359 U.S. 231. Accordingly, one who provokes another's violence may be barred from recovering damages for his injury. See *Appeal of Coates*, 287 P. 2d 102, 47 Wash. 2d 51. To permit an employer to discharge for striker conduct provoked by his own violations of the Act, far from effectuating the Act's policies, encourages provocative violations calculated to provide grounds for breaking union strength by discharges. Conversely, the Act's purposes *are* clearly effectuated by reinstatement of unfair labor practice strikers discharged for conduct provoked by flagrant employer violations. Cf. *Mastro Plastics Corp.* v. *N.L.R.B.*, 350 U.S. 270. Reinstatement in such circumstances merely leaves parties who have violated each other's legal rights in an equivalent position—neither is permitted to penalize the other and the Board's prospective remedies come into play to assure future compliance with the Act.[4]

---

[4] Since Kohler provoked and was contributorily responsible for the retaliatory misconduct of its workers, discharges therefor are not "for cause" within the meaning of the Section 10(c) proviso. The Company misconceives the import of that proviso, which merely codified existing rulings. As Senator Taft explained before the Senate, "all this language does is simply to say exactly what the present rule is . . . For the purpose of the record I am glad to make that statement, because there is no intention whatever to change the existing law on this particular question" (93 Cong. Rec. 6518). Senator Ball confirmed Senator Taft's view (93 Cong. Rec. 7683). The pre-existing law which Congress apparently intended to codify was that embodied by Section 8(3) cases such as *Wyman-Gordon*. It was to the *Wyman-Gordon* situation that the House Conference Report

Finally, exceptional circumstances were presented to the Board in this case by the Company's inclusion among the dischargees of all thirteen leaders of the Union. Certainly, even under the Board's order requiring good faith bargaining, Kohler workers without their experienced leaders are no match for a Company which has for three decades rebelled against its federal bargaining obligation. Accordingly, the most fundamental purposes of the Act were effectuated by the Board's order restoring the conditions prevailing before the unfair labor practice strike, including restoration of the Union leadership. So appropriate an exercise of the Board's power to vindicate the statutory duty of collective bargaining, falling within the very core of the Board's reinstatement authority under Section 10(c) to "effectuate the policies" of the Act, presents no substantial issue for this Court's review.

---

pointed in its specific explanation of the "for cause" proviso—*where the unfair labor practice charged was a discriminatory discharge* in violation of 8(3), and the courts had barred the Board from finding discrimination and reinstating employees who may have belonged to the union but were actually discharged because of the kind of activities enumerated in the House report. See House Conference Rept. No. 510, on H.R. 3020, at p. 55.

But even if it were assumed for argument's sake that the "for cause" proviso was intended to do more than to codify existing 8(3) law (contrary to Senator Taft's explanation), no broader application should be given the proviso than that dictated by reason and authorities from adjacent areas. Those authorities (see cases listed in n. 22 of the first Court of Appeals opinion, Supp. J.A. 2326) generally look to the existence of employer provocation in determining whether misconduct is "cause" or "just cause" for discharge. Thus, in this case, where the misconduct in issue was provoked by Company violations and is not of the kind to indicate employee *unfitness for future service,* it would strain normal and customary construction to find that the misconduct constituted "cause" when balanced against employer provocations and violations. It was therefore unnecessary in the instant case to determine just what constitutes the "cause" for discharge which might have been in the minds of the House conferees, since in any event the conduct here falls outside the normal construction of that term.

Nor is there the conflict alleged by Kohler with this Court's decision in *N.L.R.B.* v. *Fansteel Metallurgical Corp.*, 306 U.S. 240, or with the Circuit Court rulings in *N.L.R.B.* v. *Clearfield Cheese Co.*, 213 F.2d 70, *N.L.R.B.* v. *Longview Furniture Co.*, 206 F.2d 274, or *W. T. Rawleigh Co.* v. *N.L.R.B.*, 190 F.2d 832. This Court in *Fansteel* did not delete from the Act the Board's express power to reinstate discharged strikers. All that the Court ruled there was that in light of the aggravated conduct of certain sit-down strikers the Board had exceeded its ambit of discretion in their reinstatement: "We are of the opinion that to provide for the reinstatement or re-employment of employees guilty of the acts which the Board finds to have been committed *in this instance* would not only not effectuate any policy of the Act but would directly tend to make abortive its plan for peaceable procedure . . . whatever discretion may be deemed to be committed to the Board, its limits were transcended by the order under review" (306 U.S. at 256, emphasis supplied). Similarly, the Circuit Court decisions cited by the Company in no way impair the Board's discretionary authority in appropriate circumstances to reinstate unfair labor practice strikers.[5] In the absence of any conflict in rulings and

---

[5] In *Clearfield Cheese*, 213 F.2d 70, the Third Circuit reversed a Board "condonation" ruling regarding 21 discharged workers, but no Section 10(c) discretion point was either made to or passed upon by the Court. In *Longview Furniture*, 206 F.2d 274, the Fourth Circuit found that the Board had exceeded its Section 10(c) discretion by reinstating workers who had participated in a criminal assault, but the Court merely returned for Board reconsideration the reinstatement question regarding strikers discharged for less serious misconduct. And in *W. T. Rawleigh*, 190 F.2d 832, the Seventh Circuit only reversed a Board reinstatement order as an abuse of Board discretion where the misconduct of the workers was serious and there was *no provocative employer misconduct* such as that engaged in by the Kohler Company. None of the three decisions deny the Board an area of discretion to reinstate strikers discharged for misconduct in such circumstances as are presented in the present case.

any substantial issue as to the Board's exercise of its statutory discretion to require reinstatement, no grounds are presented for this Court's review of the ruling below.

Conclusion

For the foregoing reasons it is submitted that the writ should be denied.

Respectfully submitted,

JOSEPH L. RAUH, JR.,
JOHN SILARD,
STEPHEN I. SCHLOSSBERG,
1625 K Street, N. W.,
Washington, D. C.
Attorneys for Local 833, UAW-AFL-CIO.

(5756-2)